IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. CIVIL WRIT PETITION NO.3413 OF 2005

DATE OF DECISION: DECEMBER ,2006

Union of India.

.....Petitioner

VERSUS

Punjab Financial Corporation, Chandigarh and another

....Respondents

2. CIVIL WRIT PETITION NO.6788 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab State Industrial Development Corporation Ltd., Chandigarh and another.

....Respondents

3. CIVIL WRIT PETITION NO.7260 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab Financial Corporation, Chandigarh and others

....Respondents

4. CIVIL WRIT PETITION NO.3773 OF 2004

Union of India.

.....Petitioner

VERSUS

Punjab Financial Corporation, Chandigarh and another

....Respondents

5. CIVIL WRIT PETITION NO.2428 OF 2006

Union of India.

.....Petitioner

VERSUS

Punjab National Bank, Ludhiana and others

....Respondents

6. CIVIL WRIT PETITION NO.10879 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab State Financial Corporation, Chandigarh and others.

....Respondents

7. CIVIL WRIT PETITION NO.741 OF 2006

Union of India.

.....Petitioner

VERSUS

Punjab State Financial Corporation, Chandigarh and another.

....Respondents

8. CIVIL WRIT PETITION NO.6752 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab Financial Corporation, Chandigarh and another

....Respondents

9. CIVIL WRIT PETITION NO.5685 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab and Sind Bank, Ludhiana and others

....Respondents

10. CIVIL WRIT PETITION NO.3385 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab Financial Corporation, Chandigarh and others

....Respondents

11. CIVIL WRIT PETITION NO.13618 OF 2005

Union of India.

.....Petitioner

VERSUS

Union Bank of India and others

....Respondents

12. CIVIL WRIT PETITION NO.14310 OF 2004

Union of India.

.....Petitioner

VERSUS

Punjab Financial Corporation, Chandigarh and others

....Respondents

13 CIVIL WRIT PETITION NO.3140 OF 2005

Union of India.

.....Petitioner

VERSUS

The Chief Manager, Oriental Bank of Commerce, Ludhiana and another

....Respondents

14 CIVIL WRIT PETITION NO.8502 OF 2005

Union of India.

.....Petitioner

VERSUS

The State Bank of Bikaner and Jaipur and others

....Respondents

15 CIVIL WRIT PETITION NO.9587 OF 2005

Union of India.

.....Petitioner

VERSUS

Oriental Bank of Commerce and others

....Respondents

16 CIVIL WRIT PETITION NO.2347 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab Financial Corporation, Chandigarh and others

....Respondents

17 CIVIL WRIT PETITION NO.7897 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab Financial Corporation, Chandigarh and another

....Respondents

18 CIVIL WRIT PETITION NO.9189 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab and Sind Bank and others

....Respondents

19 CIVIL WRIT PETITION NO.8503 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab National Bank and another

....Respondents

20 CIVIL WRIT PETITION NO.6783 OF 2005

Union of India.

.....Petitioner

VERSUS

State Bank of Patiala and others

....Respondents

21 CIVIL WRIT PETITION NO.3408 OF 2005

Union of India.

.....Petitioner

VERSUS

The General Manager, Distt.Industries Centre and others

....Respondents

22 CIVIL WRIT PETITION NO.7268 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab National Bank, New Delhi and another

....Respondents

23 CIVIL WRIT PETITION NO.8141 OF 2004

Union of India.

.....Petitioner

VERSUS

The Andhra Bank, Ludhiana and another

....Respondents

24 CIVIL WRIT PETITION NO.3317 OF 2005

Union of India.

.....Petitioner

VERSUS

Punjab State Industrial Development Corporation, Chandigarh and others

....Respondents

25 CIVIL WRIT PETITION NO.11540 OF 2005

Punjab Financial Corporation, Chandigarh

.....Petitioner

VERSUS

State of Punjab and others

....Respondents

26 CIVIL WRIT PETITION NO.12351 OF 2004

Punjab Financial Corporation, Chandigarh

.....Petitioner

VERSUS

State of Punjab and others

....Respondents

27 CIVIL WRIT PETITION NO.4124 Of 2005

Punjab Financial Corporation, Chandigarh

.....Petitioner

VERSUS

Union of India and others

....Respondents

28 CIVIL WRIT PETITION NO.12362 OF 2004

Punjab Financial Corporation, Chandigarh

.....Petitioner

VERSUS

Union of India and others

....Respondents

29 CIVIL WRIT PETITION NO.14572 OF 2004

Punjab Financial Corporation, Chandigarh

.....Petitioner

VERSUS

Union of India and others

....Respondents

30 CIVIL WRIT PETITION NO.4123 OF 2005

Punjab Financial Corporation, Chandigarh

.....Petitioner

VERSUS

Union of India and others

....Respondents

31 CIVIL WRIT PETITION NO.6873 OF 2005

Haryana Financial Corporation, Chandigarh

.....Petitioner

VERSUS

State of Haryana and others

....Respondents

32 CIVIL WRIT PETITION NO.11211 OF 2003

Haryana Financial Corporation, Chandigarh

.....Petitioner

VERSUS

Union of India and others

....Respondents

33 CIVIL WRIT PETITION NO.8373 OF 2004

Haryana Financial Corporation, Chandigarh

.....Petitioner

VERSUS

Union of India and others

....Respondents

34 CIVIL WRIT PETITION NO.14417 OF 2004

Punjab State Industrial Corporation Ltd., Chandigarh

.....Petitioner

VERSUS

Union of India and others

....Respondents

35 CIVIL WRIT PETITION NO.11507 OF 2005

Harbans Lal Mehta

.....Petitioner

VERSUS

Union of India and others

....Respondents

36 CIVIL WRIT PETITION NO.844 OF 2005

Income-tax Officer, Mandi Gobindgarh

.....Petitioner

VERSUS

The Debt Recovery Tribunal and another

....Respondents

37 CIVIL WRIT PETITION NO.11831 OF 2006

Centurian Bank of Punjab Ltd., Goa

.....Petitioner

VERSUS

State of Haryana and others

....Respondents

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

PRESENT: Ms. Ranjana Sahai, Advocate.

Mr.G.S.Anand, Advocate,
for Punjab Financial Corporation.

Mr.Yogesh Putney, Advocate.

Mr.B.S.Bhatia, Advocate,
for Mr.R.S.Bhatia, Advocate.

Mr.Rakesh Nagpal, Advocate.

Mr.Puneet Gupta, Advocate.

Mr.P.D.Mehta, Advocate.

Mr.M.S.Guglani, Advocate,
Central Government Counsel.

Mr.Susheel Gautam, Advocate,
for Mr.Gurpreet Singh,
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Mr.Deepak Jindal, AAG, Haryana.

Mr.J.S.Chandail, AAG, Punjab.

Mr.Mukand Gupta, Advocate.

Mr.G.S.Sandhawalia, Advocate.

Mr.Kulwinder Singh, Advocate,
for Mr.B.R.Bansal, Advocate.

Mr.Vikas Mohan Gupta, Advocate.

Mr.Salil Sagar, Advocate.

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RANJIT SINGH, J.

A short, but interesting question of law, arises in the bunch of these writ petitions. The issue raised in these petitions relates to the doctrine of priority of crown debt due on account of arrears of tax/excise duty in favour of State over the secured or other creditors. In other words, Union of India has filed these petitions involving the doctrine of priority of crown debt while seeking priority of recovery of its taxes in the form of excise

duty/other taxes, over the rights of creditors like Financial Corporations.

In all there are 37 writ petitions listed, out of which 25 petitions have been filed by Union of India against the Financial Corporations, seeking a writ of mandamus to the effect that the tax/excise duty payable to the Union of India would have a priority over the debts payable to the Financial Corporation.6 writ petitions have been filed by the Punjab Financial Corporation, 3 by the Haryana Financial Corporation, challenging the order passed against them in this regard whereas 3 writ petitions have been filed by the private individuals, challenging the auction proceedings. All the 37 writ petitions are being disposed of by this common judgement.

Main submissions in this case made on behalf of Union of India were from Civil Writ Petition No.3413 of 2005 (Union of India, Ropar Vs. Punjab Financial Corporation, Chandigarh and another). Accordingly, the facts necessary to determine the legal issue raised have been taken from the said writ petition. It may require a mention at the outset that pleadings in this writ petition are lacking in detail, may be because of the fact that Union of India-petitioner was mainly concerned with the legal issue raised relating to crown debt priority only. The brief facts, as mentioned in this writ petition, are accordingly being taken note of.

This writ petition has been filed on behalf of Central Excise Department. M/s Kishan Organics Private Limited, Chanalon, (hereinafter called “the Company”) is stated to be registered with the Central Excise Department for manufacture of excisable goods. This

concern was debtor of Punjab Financial Corporation Limited, Chandigarh (hereinafter called, "PFC"). The Company closed down its operation and now the whereabouts of its owners are also not known. Since the Company owed debt to PFC, the Unit was taken over in exercise of the powers given to Financial Corporation under the Punjab Financial Corporation Act. The Company was accordingly put to auction and was disposed of for Rs.15 lacs. Even after adjusting the sale proceeds so realised, a sum of Rs.34.41 lacs to PFC is still stated to be outstanding towards the Company. The Central Excise Department took up the matter with PFC vide their communication dated 26.10.2004 and 17.11.2004 and in response thereto, the intimation about the sale and sale proceeds, as afore-mentioned, were brought to the notice of the Central Excise Department by the PFC. PFC had further informed the Central Excise Department that they did not have any surplus deposit, which could be paid to satisfy the Central Excise dues towards the Company. Claiming that the Central Excise Department had been continuously asking for recovery of its due from PFC as it had taken over and sold the Unit, which faced a categorical refusal, the department was left with no option but to make the present approach by filing writ petitions for realisation of its dues from the PFC. In support of the stand in the writ petitions, reliance has been placed on number of judgements to say that the amount due to the department as taxes would have a priority over the claim of the Financial Corporation and hence, the Financial Corporation was not justified in law in declining to pay central excise dues before adjusting its debts.

Notice of motion was issued and reply has been filed by

PFC. Preliminary objection has been raised about the maintainability of the writ petition on the ground that there is no cause for the Union of India to file this writ petition. It is stated that a writ can be maintained only if there is any violation of some legal or fundamental rights or violation of any provision of law. In this case, it was only a case of recovery of excise duty, which cannot be done by filing a writ petition, specially so when there is no averment of violation of any legal or fundamental rights. The objection in regard to delay has also been raised, claiming that the liability to pay excise duty by the Company relating to period which is 10 years back from the date of filing of the writ petition and hence the writ petitions suffered from delay and laches. The objection in regard to locus of the petitioner-Union of India on the ground that the answering respondent-PFC was a secured creditor has also been raised. In this regard, support has been sought from certain judgements of the Hon'ble Supreme Court. It has further been pleaded that the rule of priority in favour of crown as pleaded by the petitioner-Union of India cannot be enforced against the secured creditors like PFC. Otherwise, there is not much dispute between the parties so far as the facts pleaded in the case are concerned. PFC, in reply, has disclosed that even after selling the Unit, it has still to recover a sum of Rs.41,07,268/- from respondent No.2. It is, thus, submitted that the writ petition deserves to be dismissed. As already noticed, almost identical claim has been made by Union of India in 25 writ petitions filed on behalf of Central Excise Department.

On the other hand Financial Corporations have filed the writ petitions impugning the notices or attachment orders issued by the

Collector-cum-Deputy Excise and Taxation Commissioner etc. for sale of immovable property to recover the arrears of tax etc. Since the property sought to be sold by way of auction had been mortgaged with the Corporation like PFC/HFC, they felt aggrieved against such notices/attachment orders and hence filed writ petitions. Since the issue involved in these writ petitions also related to the aspect of priority of recovery of the debt or taxes between the competing claims of Government and Corporation, these were ordered to be heard alongwith the writ petitions filed by Union of India.

In some of the writ petitions filed by Haryana Financial Corporation, the order attaching the property mortgaged with the Corporation has been made the subject matter of challenge. Besides seeking quashing of the said order passed by Commissioner of Central Excise, directions for restraining Union of India from auctioning the said property have also been sought. It is urged that the Financial Corporation would have prior right to realise its debts than the tax dues to the respondent-Excise Department since the property stood mortgaged with the Corporation.

Centurian Bank is also a writ petitioner in Civil Writ Petition No.11831 of 2006, seeking direction for quashing of the order of attachment in respect of M/s Sachdeva and sons Rice Mills Limited, on the ground that said concern was sold by the bank in a proper and legal manner and the sale proceed had been deposited with the petitioner-Bank. The Sub Registrar, however, refused to register the sale certificate. The Bank later learnt that this property has been illegally got attached. Since the purchaser was insisting upon registration of the sale certificate, the petitioner Bank deposited

a sum of Rs.42,69,887/- under protest on 30.3.2006. In the writ petition, order of attachment is impugned and refund of the abovesaid amount so deposited has been sought on the ground that the charge of the bank by way of mortgage would have priority over the recovery of sales tax.

In Civil Writ Petition No.11507 of 2005, petitioner Harbans Lal, is aggrieved against the order of attachment of his property where he had constructed a residential house on the ground that this property had already been mortgaged with the Corporation and the said Corporation would have a preferential right over the said property than respondent No.2-Collector-cum-Deputy Excise and Taxation Commissioner, Ludhiana Range, Ludhiana.

I have heard all the counsel appearing for respective parties in these writ petitions.

As can be seen, the basic issue in these cases relate to the priority claimed by Union of India in recovering its dues like taxes or excise duty by invoking the doctrine of `crown priority debt'. This has been resisted by the PFC and other respondents like banks etc. on the ground that such priority would not be available against those who are secured creditors. Further submissions have also been made to the effect that this doctrine may not be available for its applicability in the present cases, not being a law of the land and in this regard certain judgements have also been referred to and relied upon. Both the parties have placed very strong reliance in the case of Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and others, AIR 2000 Supreme Court 3654 in support of their respective submissions. Accordingly, this case would require detailed analysis

to see if it can be said to be applicable to the facts and law involved in the present writ petitions. Since the issue relating to the crown debt priority has been addressed in detail, it may require some consideration to see the background and applicability of this doctrine to the cases in hand.

Ms.Ranjna Shahi, appearing on behalf of Union of India in majority of the writ petitions, after referring to the provisions of Section 29 of the Financial Corporation Act, has submitted that on taking over of a sick unit, mortgaged with the Financial Corporation, it would become owner of the said concern by operation of law and as such, would be liable for all the dues that the concern taken over may owe to Government by way of taxes or excise duty etc. Referring to the doctrine of crown priority debt, counsel would contend that the excise duty due towards the Company taken over by Financial Corporation, would have a priority over any debt that may be due to the Financial Corporation. On the other hand, counsel appearing for the respondents, would controvert the submission of the counsel for Union of India and would submit that the doctrine of crown debt priority may not have any strict applicability in the present day and specially in the present cases and even if it was to apply or was applicable, it would not effect the right of Financial Corporations, who are the secured creditors. Judgements cited may now need a notice. Issue regarding the applicability of certain English common law rules or doctrine for their applicability to India after the advent of the Constitution of India arose before. Hon'ble Supreme Court in Director of Rationing and Distribution Versus

The Corporation of Calcutta, AIR 1960 Supreme Court 1355. In this case, English common law rules that Crown is not bound by any statute for its applicability in India was in issue before the Hon'ble Supreme Court. Government of West Bengal, through one of its officers, was ordered to be prosecuted for using certain premises for storing rice without licence. The Hon'ble Supreme Court, by majority, held that the rule of interpretation of statutes that the State is not bound by a statute, unless it is so provided in express terms or by necessary implication is still a good law. It was also held that the common law of England is that the King's prerogative is illustrated by the rule that the sovereign is not necessarily bound by a statutory law, which binds the subject. It was viewed that King is not bound by a statute unless he is expressly named or unless he is bound by necessary implication or unless the statute being for the public good, it would be absurd to exclude the King from it. Noticing this to be a law applicable to India, until the advent of the Constitution, the Hon'ble Supreme Court observed that the Constitution has also not made any change in that position. It was noticed that “there are no words in the Constitution, which can be cited in support of the proposition that the position has changed after the republican form of Government has been adumbrated by our Constitution. The immunity of Government from the operation of certain statutes, and particularly statutes creating offences, is based upon the fundamental concept that the Government or its officers cannot be a party to committing a crime-analogous to the `prerogative of perfection' that the King can do no wrong. Whatever may have been the historical reason of the rule, it has been adopted in our country

on grounds of public policy as a rule of interpretation of statutes". In short, it was held that the State is not bound by a statute unless it is so provided in express terms or by necessary implication, which was stated to be a good law till then. In this case, Justice K.N.Wanchoo expressed a contrary view and did not subscribe to the view expressed by majority. Hon'ble Justice Wanchoo, while giving reasons in support of his differing opinion, came to conclude that there is neither justification nor necessity for continuing the rule of construction based on the royal prerogative. The learned Judge went on to say that "in our country it would be impossible now to point to one person or institution and to say that he or it is the sovereign under the Constitution. A further question may arise, if one is in search of a sovereign now, whether the State Government with which one is concerned here is sovereign in the same sense as the English King (though it may have plenary powers under the limits set under our Constitution). This to my mind is another reason why there being no King or sovereign as such now in our country, the rule of construction based on the royal prerogative can no longer be invoked."

This judgement came to be considered by a Constitution Bench of 9 Judges in the case of Superintendent and Remembrance of Legal Affairs, West Bengal Vs. Corporation of Calcutta, AIR 1967 Supreme Court 997. The Hon'ble Bench held that where the particular branch of Common Law became part of law of India or in any part thereof would be a question of fact. It was also held that common law doctrine that the crown is not bound by statute save by express provision or necessary implication was not the law of land.

This doctrine was held to be a rule of construction and not `law'. This was also found inconsistent with principle of equality enshrined in Constitution and was also stated to be incongruous in present setup. Accordingly, the Bench held that this should not be applied for construing statutes in India. It would be of benefit to note the observations of the Hon'ble Court in this case, which are as under:-

> “Some of the doctrines of common law of England were administered as the law in the Presidency Towns of Calcutta, Bombay and Madras. The Common Law of England was not adopted in the rest of India. Doubtless some of its principles were embodied in the statute law of our country. That apart, in the Muffasil, some principles of Common law were invoked by courts on the ground of justice, equity and good conscience it is, therefore, a question of fact in each case whether any particular branch of the Common Law became a part of the law of India or in any particular part thereof.
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> The rule of construction that the, Crown is not bound by a statute save by express provision or necessary implication was not accepted as a rule of construction through out India and even in the Presidency towns it was not regarded as inflexible rule of construction. In short it had not become a law of the land. Even assuming that the rule had been accepted as a rule of construction, throughout India, the rule cannot be called the law of the land

after the Constitution came into force. It is true that the expression `law in force' in Art.372 of the Constitution includes not only enactments of the Indian Legislature but also the common law of the land which was being administered by the Courts in India. But it is not possible to hold that a mere rule of construction adopted by English Courts and also by some of the Indian Courts to ascertain the intention of the Legislature was a law in force within the meaning of this term. There is an essential distinction between a law and a canon of construction. A rule of construction is not a `law in force' within the meaning of Art.372 of the Constitution.

The rule of construction that the king is not bound by a statute unless he is expressly named or brought in by necessary implication, which was accepted by the Privy Council in interpreting statutes vis-a-vis the Crown is inconsistent with and incongruous in the present set up. We have no Crown; the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination. There is, no justification to accept the English canon of construction, for it brings about diverse results and

> conflicting decisions. On the other hand, the normal construction namely, that the general Act applies to citizens as well as to State unless it expressly or by necessary implication excepts the State from its operation, steers clear of all the anomalies. It prima-facie applies to all States and subjects alike, a construction consistent with the philosophy of equality enshrined in our Constitution. The natural approach avoids the archaic rule and moves with the modern trends. This will not cause any hardship to the State. The State can make an Act, if it chooses, providing for its exemption from its operation. Though the State is not expressly exempted from the operation of an Act, under certain circumstances such an exemption may necessarily be implied. Such an Act, provided it does not infringe fundamental rights, will give the necessary relief to the State. The said canon of construction was not `the law in force' within the meaning of Art.372 of the Constitution, and should not be applied for construing statutes in India."

It would be, thus, seen that the Constitutional Bench found that we have no Crown; the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic. This doctrine was found to be introducing conflicts and discrimination. The Constitution Bench specifically over-ruled the judgement in the case of Director of Rationing and

Distribution (Supra). It would be noticeable that dissenting view of Justice K.N.Wanchoo, found approval in this Constitutional Bench decision. Thus, the view expressed earlier terming the doctrine like King can do no wrong or any such doctrine like Crown priority debt etc. would have applicability having regards to the facts in each case. It was not to apply for interpretation as was held by the Constitutional Bench decision of the Hon'ble Supreme Court.

In case of Collector of Aurangabad and another Vs. Central Bank of India and another, AIR 1967 Supreme Court 1831, the Hon'ble Supreme Court went into the question of priority of crown debt doctrine. The Court held that English Common Law Doctrine of the priority of Crown debts was given judicial recognition in territory known as “British India” prior to 1950 in regard to the recovery of tax dues in priority to other private debts of the tax payer. It was further held that the doctrine having been incorporated into Indian law, is a “law in force” in the territory of India and by virtue of Article 372 (1) of the Constitution of India, it continues to be in force in India until it is validly altered, repealed or amended. While so holding, the Hon'ble Supreme Court relied upon a judgement in the case of M/s Builder Supply Corporation Vs. Union of India, AIR 1965 SC 1061 and distinguished the case of Superintendent and Remembrance of Legal Affairs' case (Supra). Despite so holding, the Hon'ble Supreme Court found that the doctrine of priority of Crown debts was not given judicial recognition in the territory of Hyderabad State before its incorporation into the Indian republic and, therefore, it could not be applied in the case before the Hon'ble Court. It is, thus, obvious that apart from applicability of a doctrine, which was required to be seen

as a matter of fact, whether this doctrine was applied or followed in a particular part of the Indian republic before the advent of Constitution was another factor required to be seen. This was a case where the Collector of Aurangabad was claiming priority towards the payment of sale tax according to Common law doctrine of priority of Crown debts and the Hon'ble Supreme Court in this regard held:-

> " The royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and comprehends, all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England."
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> The question about the applicability of the priority of Crown debts was considered by the Bombay High Court in 1868 in Secretary of State in Council for India v. Bombay Landing and Shipping Co. Ltd., (1868-69) 5 Bom.HCOC 23, in which it was held that a judgment debt due to the Crown was in Bombay entitled to the same precedence in execution as a like judgment debt in England, if there is no special legislative provision affecting that right in the particular case. The same view has been taken by the Bombay High Court in a later case – Bank of India v. John Bowman, AIR 1955 Bom 305 – in which Chagla. C. J. pointed out that the priority given to the Crown was not on the basis of its debt being a judgment debt or a debt arising out of statute, but the

principle was that if the debts were of equal degree and the Crown and the subject were equal, the Crown's right would prevail over that of the subject. The same view has been adopted by a Full Bench of the Madras High Court in Manickam Chettiar v. Income-tax Officer, Madura, 1938-6 ITR 180, in which it was held that the income-tax debt had priority over private debts and the Court had inherent power to make an order for payment – of moneys due to the Crown. A similar view has been expressed by the Madras High Court in Kaka Mohamed Ghouse Sahib and Co. v. United Commercial Syndicate 1963-49 ITR 824 (Mad). All these authorities have been quoted with approval by this Court in Builders Supply Corporation v. Union of India, 1965-56 ITR 91, in which it was held that the Government of India was entitled to claim priority for arrears of income-tax due to it from a citizen over debts from him to unsecured creditors and that the English common law doctrine of the priority of Crown debts has been given judicial recognition in the territory known as “British India”, prior to 1950 in regard to the recovery of tax dues in priority to other private debts of the taxpayer. It was pointed out, therefore, that the English Common Law doctrine having been incorporated into Indian law, was a `law in force' in the territory of India, and, by virtue of Art. 372(1) of the Constitution of India it continued to be in force in India until it was validly altered, repealed or amended.”

While dealing with the Constitution Bench's decision in the case of Superintendent and Remembrance of Legal Affairs' case (Supra), the Hon'ble Supreme Court in the case of Collector Aurangabad (supra) observed as under:-

> "It was, however, argued for the respondents that the authority of the decision of this Court in 1965-56 ITR 91 has been affected to some extent by the later decision of a larger Bench of this Court in Superintendent and Remembrancer of Legal Affairs, West Bengal v. Corporation of Calcutta Cri. App. No. 193 of 1964, D/- 7-12-1966 = (AIR 1967 SC 1061), in which it was held that the rule of English Common Law that the State was not bound by the provisions of a statute unless it was expressly named or brought in by necessary implication, was not accepted as a rule of construction throughout India and, therefore, it has not become law of the land. It was further held that even on the assumption that it was accepted as a rule of construction throughout India, it was only a rule of construction and not a rule of substantive law and, therefore, cannot be said to be " a law in force" within the meaning of Art., 372. Lastly, this Court expressed the view that the rule of construction was incongruous in a democratic republic and it was inconsistent with the rule of law based on the doctrine of equality and, therefore, the said canon of construction should not be applied for construing statues in India. In

> our opinion, there is nothing in this judgment which affects the authority of the previous decision of this Court in 1965-56 ITR 91. On the other hand, the majority judgment of the learned Chief Justice has referred to the decision in H. Snowden Marshall v. People of the State of New York, (1920) 65 Law Ed 815, which lays down a similar doctrine, namely, that the State of New York has the common law prerogative right of priority over unsecured creditors, and distinguished the case on the ground that it had nothing to do with the rule of construction but was based upon the common law prerogative of the Crown."

In this background, the Hon'ble Supreme court found that this doctrine had not been recognised in the Hyderabad State and accordingly the appeal was dismissed.

In Builder Supply Corporation's case (Supra), the question of Government claiming priority for arrears of income-tax due from the assessee over the private debt was under consideration. Referring to Section 46(2) of the Income-tax Act, it was held that the same did not deal with doctrine of priority of Crown debts at all as it merely provided for recovery of arrears of tax due from an assessee as if it were an arrears of land revenue. This provision, as observed, would not convert the arrears of tax into arrears of land revenue either; and it was found that all that it purported to do was to indicate that after receiving the certificate from the Income-tax Officer, the Collector had to proceed to recover the arrears as if the arrears were arrears of land revenue. This

provision accordingly was found to confer no priority rights or the one which may provide for the principle of priority of tax dues at all, though in this case, it was held that the consensus of judicial opinion was that arrears of tax due to the State can claim priority over private debt and that the law was confined to this narrow part. In this regard, it was laid down as under:-

> "At this stage, we ought to make it clear that in the present appeal we are dealing with a very narrow point, and that relates to respondent No.1's claim that arrears of tax due to it have precedence or priority over money debts due to a private creditor from the same debtor. We think it necessary to emphasise this aspect of the matter, because the basic doctrine of Crown privileges as originally evolved by Common law in England may lead to different categories of claims made in different circumstances and by different States in India; and we want to make it clear that our present decision should be confined only to the narrow point with which we are directly concerned. Questions may arise as to whether the relevant Common law doctrine was accepted in some Indian States. If it is shown that it was not, it may have to be considered whether Art. 372 (1) would assist the endorsement of the said doctrine in such States. One thing is clear that if the said doctrine was accepted as a part of the law in any part of the country, it will not cease to be operative, because it is included in the expression "law in force" under Art. 372 (1), but the position would be

different in respect of such parts of the territory of India where the said doctrine was not recognised or applied prior to 1950. Then again, if this doctrine is supposed to be an essential attribute of sovereignty, where does sovereignty reside after the Constitution? Does it reside in the Union as well as all the constituent States? If yes, what would be the position if competing claims were made by the State inter se, or by one of the States against the Union? That is another aspect of the matter which may need careful examination in future."

The basic justification for claim for priority of State debts, as noticed by the Hon'ble Supreme Court, was on the well recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State Government, it would not be able to function as a sovereign Government at all. It was further noticed that it is essential that as a sovereign, the State should be able to discharge its primary Governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues. This judgement of course would have to be read in the light of the law laid down by the Constitutional Bench in Superintendent and Remembrance of Legal Affairs' case (Supra).

Another case of significance referred was that of The Bank of Bihar Vs. The State of Bihar and others, AIR 1971 Supreme Court 1210. This case relates to the rights of Pawnee

who has parted with money in favour of Pawnor on the security of the goods. While determining the right of priority in such a case, the Hon'ble Supreme Court held that the Pawnee has special property and lien on the goods and so long as his claim is not satisfied, no other creditor of the pawnor has any right to take away the goods or its price.

Then came Dena Bank's case (Supra), on which strong reliance has been placed by both the parties. The counsel for Union of India would urge that Dena Bank's case (supra) clearly laid down a ratio that the arrears of tax due to the State can claim priority over the other debts. On the other hand, counsel for PFC strenuously submitted that such priorities, even if available to claim, would be over the private debts and not the secured debts like that of the Financial Corporations. The submission made before the Hon'ble Supreme Court on behalf of Dena Bank was that right of the State to realise its arrears of tax could not take precedence over the right of the Bank to enforce its security, it being a secured creditor. The question that arose for consideration in this case before the Hon'ble Supreme Court was as to whether recovery of sale tax dues (amount to Crown debt) shall have precedence over the right of bank to proceed against the property of the borrower mortgaged in favour of the Bank. While dealing with the common law doctrine of priority of crown debts, the Hon'ble Supreme Court held as under:-

> "What is common law doctrine of priority or precedence of crown debts ? Halsbury, dealing with general rights of the crown in relation to property, states where the Crown's right and that of a subject meet at one and the

same time, that of the Crown is in general preferred, the rule “detur digniori” (Laws of England, Fourth Edition Vol. 8 Para 1076 at page 666). Herbert Brown states - “Quando just domini regis et subditi concurrent jus regis praeferri debet – Where the title of the King and the title of a subject concur, the king's title must be preferred. In this case detur digniori is the rule .....where the titles of the king and of a subject concur, the king takes the whole.....where the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred” (Legal Maxims 10th edition, pp. 35-36). This common law doctrine of priority of State's debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence the doctrine has been treated as “law in force” within the meaning of Article 372 (1) of Constitution. An illuminating discussion of the subject made by Chagla, C.J. is to found in Bank of India v. John Bowman – AIR 1955 Bombay 305. We may also refer to Full Bench decision of Madras High Court in Manicham Chettiar v. Income Tax Officer, Madura, AIR 1938 Madras 360 as also to two Judicial Commissioner's Court decisions in People's Bank of Northern India Ltd. v. Secretary of State for India – AIR 1935 Sind 232 and Vassanbai Topandas v. Radhabai Tirathdas, AIR 1933 Sind 368. Without multiplying the authorities we would straightway come to the Constitution Bench decision in M/s Builders Supply Corporation v. Union of India -AIR

1965 SC 1061."

While noticing the principle governing this doctrine, the Hon'ble Supreme Court held as under:-

"The principle of priority of Government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues. (See M/s Builders Supply Corporation, (AIR 1965 SC 1061) (supra). In the same case the Constitution Bench has noticed the consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts and that this rule of common law amounts to law in force in the territory of British India at the relevant time within the meaning of Article 372 (1) of the Constitution of India and therefore continues to be in force thereafter. On the very principle on which the rule is founded, the priority would be available only to such debts as are incurred by the subjects of the Crown by reference

to the State's sovereign power of compulsory exaction and would not extend to charges for commercial services or obligation incurred by the subjects to the State pursuant to commercial transactions."

Accordingly the law in this regard was summed up as follows:-

"1.There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.

2.The common law doctrine about priority of crown debts which was recognised by the Indian High Courts prior to 1950 constitutes "law in force" within the meaning of Article 372 (1) and continues to be in force.

3.The basic justification for the claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.

4. The doctrine may not apply in respect of debts due to the State if they are contracted by citizens in relation to commercial activities which may be undertaken by the State for achieving socio-economic good. In other words, where welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic

> government functions of the State and seeks to recover debts from debtors arising out of such commercial activities the applicability of the doctrine of priority shall be open for consideration. "

Counsel for the respondents, on the basis of above, has contended that the Supreme Court has very clearly held that arrears of tax due to the State can claim priority over **private debts** (emphasis supplied) as noticed from the observations reproduced above. Not only this, it has also been held that the doctrine may not apply in respect of debts due to the State if they are contracted by citizen in relation to commercial activities which may be undertaken by the State for achieving socio-economic good. Pointed reference has been made to Para 10 of the judgement to say that this would be a complete answer to the proposition of law convassed in this case. This para is as under:-

> "However, the Crowns preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgage or pledgee of goods or a secured creditors. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general

> preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In Giles v. Grover (1832) 131 ER 563 it has been held that the Crown has no precedence over a pledgee of goods. In Bank of Bihar v. State of Bihar, AIR 1971 SC 1210, the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T.L.L.,Seventh Edition, P.386) – 'It seems a Government debt in India is not entitled to precedence over a prior secured debt."

As can be noticed from the above quoted observation, the preferential right of the Crown to recover debt is only against ordinary or unsecured creditors.

It has been emphasised before me that, as held by the Hon'ble Supreme Court, where the right of the subject is complete and perfect before that of the King commences, the rule of priority does not apply as there is no point of time at which the two rights are

at conflict nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. Basing their submission on this, counsel for the respondents has contended that the rights of Financial Corporation had already perfected before the right of Excise Department etc. and hence, the petitioner-Union of India could not have any priority. It is also contended that such a priority can only be claimed over a private debts and not the secured ones as has been held in Dena Bank's case (supra). It is also noticeable that Dena Bank's Case has relied upon Bank of Bihar Vs. State of Bihar, AIR 1971 SC 1210, where the rights of pawnee were held to have not extinguished and were required to be first satisfied.

A feeble attempt was made before me to notice that the judgement in the case of Builder Supply Corporation (supra) has been relied upon by Dena Bank's case (Supra), without properly considering the effect of the Constitutional Bench decision in the case of Superintendent and Remembrance of Legal Affairs' case (Supra) referred to in detail by me. Reference was made to the case of Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 Supreme Court 38 and The Regional Manager and another Vs. Pawan Kumar Dubey, AIR 1976 Supreme Court 1766 in regard to the law regarding following the precedents and the aspect of *ratio decidendi* and "*obiter".* In Pawan Kumar Dubey's case (supra), it was observed that it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio *decidendi* and not some conclusion based upon facts which may appear to be similar. In Municipal Corporation of Delhi's case (supra)

also, it was said that quotability as law applies to the principle of a case, its ratio decidendi. It was also observed in the case that the only thing in a Judge's decision binding is an authority upon a subsequent Judge is the principle upon which the case was decided. I am not required to devolve much in detail on this aspect as I am of the view that it is clearly deducible from various judgements referred to above that the doctrine of Crown priority debt is required to be established in a part of a country where it is sought to be applied and further that this will ordinarily be confined to unsecured creditors and it may not be available as a law outside the territories known as British India. It was basically because of this reason that doctrine of priority of Crown debts was not applied in the case of Collector of Aurangabad (supra), as it was found that the same had not been recognised in Hyderabad State. Basically, the doctrines of Common Law of England, as noticed in Superintendent and Remembrance of Legal Affairs' case (Supra) were administered as the law in the precedency towns of Calcutta, Bombay and Madras. It has been observed that this common law doctrine of England was not adopted in rest of India. It is in this background that it was held that it would be a question of fact in each case where any particular branch of any law became part of law of India or in any particular part thereof. Apart from other considerations as such, it is required to be seen if this common law doctrine adopted had been applied in this part of the country or not. There is nothing on record either pleaded or otherwise brought to my notice if this doctrine was ever applied in this part of the country. Besides, it is admitted case before me that the creditors in these writ petitions are the secured creditors and

even in a law laid down in Dena Bank's case (supra), the Hon'ble Supreme Court has clearly held that this doctrine of priority would be attracted/applicable against unsecured creditors and not against others. On the basis of Dena Bank's case (supra), it can be viewed that the Crown preferential right to recover debts over other creditors is confined to ordinary and unsecured creditors and this common law adopted from England do not accord Crown a preferential right for recovery of its debts over the mortgage or pledge of goods of a secured creditors. Even where the right of the subject is complete and perfect before that of the King commences, the rule would not apply. In these circumstances, the mortgagee deeds had long been made in favour of the Financial Corporations and liability of the Excise Department obviously came into existence much subsequent thereto.

It cannot, thus, be viewed that the petitioner-Union of India or the Excise Department would have priority over the debts due towards Financial Corporation or the other secured creditors.

Much emphasis was laid by the counsel for Union of India-petitioner that in Dena Bank's case (supra), the Bank-petitioner was not granted relief indicating that the Court had given priority to sale tax over the secured creditors. Learned counsel, in my view, has failed to take notice of a very important fact that in Dena Bank's case, provisions of Karnataka Sales Tax Act, giving priority of recovering the sale tax was the main reason in this regard. Provisions of Sections 13 and 15 of Karnataka Sales Tax Act, 1957, were noticed, which had provided that arrears of sale tax would be entitled to a preference even over the debt secured by mortgage in

favour of appellant Dena Bank. Otherwise, it had been observed in Paragraph 15 of the judgement that the Common law doctrine of priority of Crown debts would not extend to providing preference to Crown debts over secured private debts. It was the impact of Section 158 (1) of the Karnataka Land Revenue Act, which specifically provided that the claim of State Government to any money recoverable under the provisions of Chapter XVI shall have precedence over any other debt which weighed with the Court to say that it gave statutory recognition to the doctrine of State priority.

Submissions were then made to urge that right of priority to recover excise dues, in view of the provisions contained in the Excise and the Customs Acts, are available which would give state a priority. Submission is that Section 11 of the Excise Act and Sections 120 and 142 of the Customs Act and so also Section 232 of the Central Excise Act would clearly show that they would give priority of recovery of the dues of the Government over the debts of the Financial Corporation or the other secured creditors. In this regard, counsel has not only referred to Dena Bank's Case but has placed strong reliance on the case of Macson Marbles Pvt. Ltd. Vs. Union of India, 2003 (158) E.L.T. 424 (S.C.). In Macson Marbles' case (Supra), the Hon'ble Supreme Court, while considering the question as to whether Industrial Unit sold in terms of Section 29 of the State Financial Corporation would be sale made and whether Rule 230 (2) of the Central Excise Rules would be attracted, has held that when the sale is made in favour of the Financial Corporation, the Central Excise Rules would be attracted. The Supreme Court, however, did not feel the necessity of examining, as to which of these two would

prevail as in the said case there was no conflict. The counsel then referred to a Division Bench judgement of Orissa High Court titled as Suburban Ply & Panels Pvt. Ltd. Vs. Asstt. Commr. Of C.EX. & CUS., BBSR, 2002 (144) E.L.T. 257 (Ori.). This judgement was rendered basically while relying upon Dena Bank's case (supra), wherein it was noticed that doctrine of priority of precedent was based on rule of necessity and this would enable the State to recovery sale tax dues under the Karnatka Sale Tax Act. In this case, while relying on Rule 230 (2) of the Excise Rules read with Section 11 of the Excise Act, department was held entitled to recover the amount from the manufacturing unit or the manufacturer or whosoever be in possession and, thus, the right of the department to proceed against the Unit was recognised.

This has been seriously contested by counsel for the respondents by referring to Dena Bank's case (supra) only. It is urged that the ratio laid down in the said case was not properly appreciated by the Division Bench of Orissa High Court in the case of Suburban Ply & Panels Pvt. Ltd.'s case (supra). Ratio in Dena Bank's Case is clearly deducible that priority was available against the unsecured debts and not the secured ones, which aspects, as per the counsel, have not been properly noticed by Division Bench in Suburban Ply's case (supra). It is further submitted that Karnataka Sales Tax Act, which was basically relied upon in Dena Bank's case, gave a priority to the sale tax even over the secured debts and that was the basic reason for the Supreme Court to hold that the sale tax would get priority over the debts of the bank in the said case. This appears to be so as can be seen from the observations of the

Hon'ble Supreme Court recorded in Para 21 of the Judgment. It was found as a matter of fact that the appellant Bank was not allowed any relief in view of Section 15(2)(a) of Karnatka Sales Tax Act, which was found to have come into force on 18.12.1983 while the decree in favour of the bank was passed on 3.8.1992 and it was yet to be executed. It is in this background that the Hon'ble Supreme Court observed that even if it was to satisfy the sale held by the State, it would merely revive the arrears outstanding on account of sale tax and the amended Section 15(2)(a) of the Karnatka Sales Tax Act shall apply, which has a preferential right to recover its dues over the rights of the appellant-bank. It is in this background of preferential right having been recognised and created by a statute that the priority was given to the recovery of sale tax. However, that apparently is not the situation in the present cases. Though reliance has been placed on the provisions of the Excise Act and the Sales Tax Act, yet no provision is noticeable, which can give priority to the dues recoverable by the Excise Department or the Custom Department as the case may be. The provisions, which were pointed out before me, mainly related to the fact that the arrears of excise dues etc. are recoverable as arrears of land revenue. In this regard, observation of Hon'ble Supreme Court in the case of M/s Builders Supply Corporation (supra) in regard to Section 46(2) of the Income-tax Act has already been made to show that it did not deal with principle of Crown debts at all. Counsel for the respondents were justified in relying upon the case of Union of India Vs. Metherukunju Moosakutty and others, AIR 1980 Kerala 182 to say that Section 11 of the Central Excise and Salt Act, which has been referred to by the

counsel for Union of India, would not give preference over the dues of other creditors either under the scheme of Revenue recovery Act or under the general law of priority of Crown debts. The Division Bench of Kerala High Court in this case has rightly noticed that the doctrine of Crown priority has a long history and this basic doctrine would be applicable only if it is shown that in a particular State, the Common law of England was adopted outside the Presidency Towns and in the absence thereof the rule of common law cannot be taken to have been the law enforced on the date the constitution came into force. Finding that there was no law in force in the territory of the erstwhile Travancore State, which would enable the State or Union Government to claim that there should be priority for State dues over dues to other creditors held that excise due can not have preference over dues to other creditors. Similar is the situation before me. It has neither been shown if this common law doctrine was enforced in the territory of these States for it to be a law for its applicability. While discussing the provisions of Section 11 of the Central Excise and Salt Act and Rule 230 (2) of the Central Excise Rules, the Division Bench of this Court has held that the goods which are pledged by the Company with the Bank cannot be detained for the purpose of extracting arrears of excise duty and similarly the goods which completely did not belong to the Company having been pledged in favour of the bank, were held not liable to adjustment or sale under the Central Excise Act. In other words, the doctrine of priority on the basis of Section 11 of the Central Excise Act and Rule 230(2) of the Central Excise Rules was held to be not creating any priority in those cases where there was special charge on the goods. Ratio that is

available from various cases referred in this regard is that when a promise is made for recovering of taxes as land revenue, then it is not provision of providing for priority. Such a provision has to be made providing as precedence that it would have priority to claim a preference. Accordingly, the submission made by counsel for the petitioners-Union of India that it would have priority over the debts of the Financial corporations on the basis of provisions of Section 11 of the Central Excise Act and Rule 230 (2) of the Central Excise Rules cannot be accepted.

The result of the above discussion is that the plea raised by the petitioners in regard to its priority of recovering excise dues or the other such like dues under the Excise Act cannot be up-held either on the applicability of doctrine of priority of Crown debts or that any such priority has been so created under any of the provisions of the Excise Act or Rules or the Customs Act.

As a result, the writ petitions filed by the Union of India are dismissed. As a necessary consequence, the writ petitions filed by the Financial Corporations, and other such writ petitions, seeking quashing of the order of attachment etc. are allowed.

The petitioner-Centurian Bank in Civil Writ Petition No.11831 of 2006 is given liberty to seek recovery of the amount deposited as arrears of tax on behalf of M/s Sachdeva and Sons Rice Mills Limited.

December , 2006 **(RANJIT SINGH)**
khurmi **JUDGE**

Whether referred to reporter? Yes